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June 09, 2009

GLORIA L. FRANKLIN, CLERK

U.S. BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA



Signed and Filed: June 08, 2009

A handwritten signature in black ink, appearing to read "T. Carlson".

THOMAS E. CARLSON  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re ) Case No. 08-30275 TEC

DEBRA A. PITZ, ) Chapter 7

Debtor. )

AMERICAN EXPRESS CENTURION BANK, ) Adv. Proc. No. 08-3053 TC

Plaintiff, )

vs. )

DEBRA A. PITZ, )

Defendant. )

**MEMORANDUM DECISION**

The court held a trial in this action on May 12, 2009.

Joseph M. O'Donnell appeared for Plaintiff American Express. Drew Henwood appeared for Defendant Debra A. Pitz. The court hereby issues the following decision, which shall constitute its findings of fact and conclusions of law.

**FACTS**

This case concerns Debra Pitz's use of two American Express

1 credit cards. Plaintiff seeks to have the resulting debt excepted  
2 from discharge on the basis that Pitz made charges without intending  
3 to repay.

4 Pitz used her Gold Card to make 156 charges totaling \$120,324  
5 (net), between June 25, 2007 and August 14, 2007. During that  
6 period, Pitz used the Gold Card to purchase the following luxury  
7 goods:<sup>1</sup> Louis Vuitton accessories totaling \$62,151; shoes totaling  
8 \$16,346; watches totaling \$4,844; other clothing totaling \$13,021;  
9 home furnishings totaling \$9,778;<sup>2</sup> computers totaling \$3,768;<sup>3</sup> and  
10 miscellaneous<sup>4</sup> luxury items totaling \$6,528. The combined amount of  
11 the purchases just described is \$113,249 (adjusted for returns).  
12 On July 20, 2007, American Express mailed Pitz a statement showing a  
13 \$119,474 balance due on the Gold Card. Pitz never made any payment  
14 on the debt shown in that statement.

15 Pitz used her Platinum Card to make charges totaling \$22,848,  
16 between June 25th and August 14th. Among those transactions was a  
17 charge of \$22,080, effectively using her Platinum Card to pay the  
18 balance due on a credit card issued by Chase. On July 24, 2007,  
19 American Express mailed Pitz a statement showing a \$23,565 balance  
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22       <sup>1</sup> The Bankruptcy Code defines luxury goods by what they are  
23 not. The "term 'luxury goods or services' does not include goods  
24 or services reasonably necessary for the support or maintenance of  
the debtor a dependent of the debtor." 11 U.S.C.  
§ 523(a)(2)(C)(ii)(II).

25       <sup>2</sup> Pitz testified that she lives in a one-bedroom apartment.  
26 Between June 25th and August 14th, Pitz made 42 purchases that  
appear to be for home furnishings.

27       <sup>3</sup> Pitz testified that she had other home computers, and did  
28 not need the additional hardware, software, and accessories that  
she purchased.

<sup>4</sup> This category includes gift cards, accessories other than  
shoes, and items purchased from Amazon and Sephora.

1 due on the Platinum Card. Pitz never made any payment on the debt  
2 shown in that statement.

3 Pitz had been an American Express cardholder for at least ten  
4 years prior to June 2007. The exhibits introduced at trial include  
5 statements for both the Gold and Platinum cards from November 2006  
6 through early 2008. In the seven months before she made the charges  
7 described above, Pitz had always paid at least the minimum required  
8 payment following receipt of her monthly statement.<sup>5</sup>

9 Pitz's financial resources were clearly inadequate to repay the  
10 the June-August 2007 charges. Pitz did not have a job in 2007. She  
11 had worked as a information technology specialist for a major law  
12 firm in 2006, but went on medical leave on August 1, 2006, and did  
13 not work between that date and the filing of her chapter 7  
14 bankruptcy petition on February 21, 2008. Pitz's total income in  
15 calendar year 2006 was \$78,000. Her stated annual salary at the law  
16 firm was likely higher than that, as she received salary for only  
17 the first seven months of the year, and received disability payments  
18 for the last five months of the year. During all of 2007, Pitz's  
19 only income consisted of disability payments that varied between  
20 \$4,100 and \$4,550 per month, while her basic living expenses  
21 averaged \$4,400 per month. Pitz did not testify regarding her job  
22 prospects. In her bankruptcy schedules, Pitz listed no significant  
23 property from which her debts could be paid.

24 Pitz testified that she suffers from bipolar disorder. She has  
25 been under the care of a psychiatrist since early 2006, was first  
26 diagnosed as bipolar in September 2007, is currently under the care  
27 of Dr. Roger Fried, and is currently taking several psychotropic

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28 <sup>5</sup> These payments are described in more detail on page 9,  
below.

1 drugs to control her disorder. Pitz testified that she was in a  
2 manic stage when she made the June-August 2007 charges. She  
3 remembers making the charges, but contends that she did not fully  
4 understand what she was doing. Pitz stated that she was very  
5 anxious, that she rarely slept, that she went into stores and bought  
6 item after item, that her life was in chaos, that she was not  
7 opening her mail, that her apartment was filled with unopened boxes  
8 and shopping bags, that she gave away many of the items that she  
9 purchased, and that at the end of her buying spree she "crashed."  
10 Pitz did not offer the testimony of Dr. Fried or any other mental  
11 health expert, nor did she explain why she did not produce such  
12 evidence. Her counsel marked for identification a few pages of  
13 medical records, but did not attempt to introduce them when  
14 Plaintiff objected to their introduction without proper  
15 authentication as business records.

16 **DISCUSSION**

17 1. Legal Standard

18 A chapter 7 discharge does not provide relief from a debt that  
19 results from a fraud perpetrated by the debtor. 11 U.S.C. § 523  
20 (a)(2)(A). To have a debt excepted from discharge, the creditor  
21 must establish the following elements: (1) that debtor obtained  
22 money by making a representation of fact; (2) that debtor's  
23 representation was false; (3) that debtor knew the representation  
24 was false and made the representation with the intent to deceive;  
25 (4) that the creditor was justified in relying upon the debtor's  
26 representation; and (5) that the creditor suffered damage as a  
27 result. Am. Exp. Travel Related Svs. Co. Inc. v. Hashemi (In re  
28 Hashemi), 104 F.3d 1122, 1125 (9th Cir. 1997).

1       Where the alleged fraud is misuse of a credit card, the courts  
2 have adopted two special rules as to how the elements of fraud can  
3 be proved. First, use of a credit card constitutes an implied  
4 representation that the debtor intends to repay the resulting debt.  
5 Id. at 1126. Second, the creditor need not obtain an express  
6 admission that the debtor did not intend to repay the charges; the  
7 court may infer the debtor's knowledge and intent from the  
8 circumstances in which the charges were made. Id. at 1125.

9       The Ninth Circuit has identified twelve factors that the court  
10 should consider in determining whether a debtor acted with intent to  
11 defraud in using a credit card.

12       (1) the length of time between the charges and the  
13 bankruptcy filing; (2) whether or not an attorney had been  
14 consulted concerning the filing of bankruptcy before the  
15 charges were made; (3) the number of charges made; (4) the  
16 amount of the charges; (5) the financial condition of the  
17 debtor at the time the charges were made; (6) whether the  
18 charges were above the limit of the account; (7) whether  
the debtor made multiple charges on the same day;  
(8) whether or not the debtor was employed; (9) the  
debtor's prospects for employment; (10) the financial  
sophistication of the debtor; (11) whether there was a  
sudden change in the debtor's buying habits; and (12)  
whether the purchases made were luxuries or necessities.

19 Hashemi, 104 F.3d at 1125 n.2. (citing Citibank South Dakota v.  
20 Dougherty (In re Dougherty), 84 B.R. 653, 657 (9th Cir. BAP 1988)).  
21 No one of these factors is controlling, nor does the creditor need  
22 to prove any minimum number of factors. The evidence is sufficient  
23 if, taken as a whole, it shows the debtor's fraudulent intent. Id.

24       The courts have also recognized that they must act carefully in  
25 inferring fraudulent intent from the acts of a debtor who is  
26 suffering from bipolar disorder. Dutreix v. Fontenot (In re  
27 Fontenot), 89 B.R. 575, 581 (Bankr. W.D.La. 1988). This is so,  
28 because a person with bipolar disorder may suffer from an irrational

1 optimism causing her to believe that "whatever [s]he was doing was  
2 going to work out." *Id.* at 579.

3 In the present case, it is undisputed that Pitz made the  
4 charges in question, that she did not have the ability to repay  
5 those charges, and that American Express suffered loss as a result.  
6 Pitz disputes that she acted with fraudulent intent, contending that  
7 her acts were the product of her bipolar disorder. Pitz also  
8 disputes that American Express acted justifiably in relying on her  
9 implied representation that she would repay, in light of the large  
10 amount and bizarre pattern of her charges.

11 2. Evidence of Intent to Defraud

12 Consideration of the surrounding circumstances suggests that  
13 Debtor made the charges after June 25, 2007 with intent to defraud.  
14 Pitz likely received the June statement for the Gold Card by June  
15 25, 2007. At that time, she knew that she had a balance of \$20,672  
16 on the Gold Card, that she had no job, and that her disability  
17 insurance payments provided no income in excess of her basic living  
18 expenses. Yet between June 25th and August 14th, Debtor used the  
19 Gold Card to purchase luxury items totaling \$113,249, and used the  
20 Platinum Card to pay the \$22,080 balance on her Chase credit card.  
21 Debtor made no payment on either card after July 5, 2007. The June-  
22 August 2007 charges substantially exceeded her highest annual  
23 income.

24 Consideration of the following Dougherty factors suggests that  
25 Pitz made the post-June 25th charges with the intent to defraud  
26 American Express: the large number of charges made,<sup>6</sup> the large total  
27 amount of the charges, Pitz's poor financial condition when she made  
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<sup>6</sup> Pitz made 156 charges on the Gold Card from June 25th through August 14th.

1 the charges, multiple charges on same day,<sup>7</sup> Pitz's unemployment when  
2 she made the charges, Pitz's sudden change in buying habits,<sup>8</sup> and  
3 the fact that approximately eighty percent of the amount charged was  
4 for the purchase of luxury goods.<sup>9</sup> The only factors weighing  
5 against a finding of fraud are that Pitz did not exceed her credit  
6 limit and that she did not file bankruptcy immediately after making  
7 the charges (she filed about six and one-half months later). There  
8 was no evidence as to when she first consulted a bankruptcy attorney  
9 or her financial sophistication.

10       The evidence of Pitz's medical condition introduced at trial  
11 does not negate this strong evidence of intent to defraud. Pitz did  
12 not offer the testimony of her psychiatrist or of any other medical  
13 expert. This court understands in a general sense that a person  
14 suffering from bipolar disorder, while in a manic phase, might  
15 sincerely believe she could successfully execute a financial plan  
16 that a healthy person would understand to be impossible. Fontenot,  
17 89 B.R. at 579. But this court cannot determine without the help of  
18 a medical expert whether Pitz suffered from such delusions at the  
19 time she made the charges in question, and whether her illness  
20 prevented her from forming the intent to defraud. See Mfrs. Hanover  
21 Trust Co. v. Hutchinson (In re Hutchinson), 27 B.R. 247, 251-52  
22 (Bankr. E.D.N.Y. 1983). I note that Pitz seems to have been able to  
23 control her use of credit cards during much of the time she has been

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25       <sup>7</sup> Pitz made 15 charges totaling \$27,758 on July 19th; 14  
26 charges totaling \$2,185 on June 26th; 13 charges totaling \$8,009 on  
27 July 3rd; and 13 charges totaling \$4,501 on June 25th.

28       <sup>8</sup> The Gold Card statement issued July 20, 2007 showed new  
charges totaling \$109,702. The largest amount of new charges shown  
on the statements for any prior month was \$17,756 (June 2007).

29       <sup>9</sup> From June 25th to August 14th, Pitz's net charges for luxury  
goods were \$113,249, while her total charges were \$143,444  
(including the \$22,080 balance transfer).

1 ill. I also note that although Pitz is apparently still ill, her  
2 testimony at trial was very precise and revealed a strong  
3 comprehension of the implications of her credit card use. In these  
4 circumstances, the court is reluctant to rely upon hearsay evidence  
5 regarding Pitz's medical condition or her own self-diagnosis,  
6 especially where Pitz offered no explanation of why her psychiatrist  
7 was not called to testify. See Keena v. United R.R. of San  
8 Francisco, 197 Cal. 148, 157-58 (1925) (court permitted to infer  
9 from party's failure to call a witness that the witness's testimony  
10 would be adverse); Navon v. Simon (In re Simon), 364 B.R. 850, 853-  
11 54 (D.Conn. 2007) (same).

12 3. Evidence of Justifiable Reliance

13 The circumstances also suggest that American Express was  
14 justified in relying upon Pitz's representation that she would repay  
15 the charges made between June 25th and August 14th. In the months  
16 before the June-August 2007 charges, Pitz steadily increased the  
17 amount of her charges on the Gold Card, then always paid more than  
18 the required minimum repayment in the following month, creating an  
19 impression that her resources were increasing. This impression was  
20 punctured only when Pitz failed to make any payment in the month  
21 following the abusive June 25-August 14 charges.

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MONTH	NEW CHARGES MADE	RESULTING BALANCE	REQUIRED PAYMENT	AMOUNT PAID NEXT MONTH
Nov. 2006	\$83	\$83	\$83	\$83
Dec. 2006	\$1,446	\$1,446	\$631	\$2,236
Jan. 2007	\$1,443	\$654	\$300	\$948
Feb. 2007	\$2,555	\$2,260	\$941	\$4,980
Mar. 2007	\$9,631	\$6,911	\$3,705	\$6,831
Apr. 2007	\$7,431	\$7,431	\$1,855	\$7,455
May 2007	\$3,951	\$3,915	\$959	\$1,000
June 2007	\$17,756	\$20,672	\$3,789	\$10,900
July 2007	\$109,702	\$119,474	\$8,660 due 8/14	\$0

The following factors also suggest that Plaintiff's reliance was justifiable: Pitz never exceeded her credit limit, Plaintiff telephoned Pitz in mid-July to confirm that the charges were genuine, and Pitz made the bulk of the abusive charges over a short period of time. See Hashemi, 104 F.3d at 1126.

Payment was due on the Gold Card on August 14, 2007; Pitz was obligated to make a payment of at least \$8,660 on a balance of \$119,474. American Express was no longer justified in assuming that Pitz would repay subsequent charges when she failed to make any payment on that date.

#### 4. Prejudgment Interest and Attorneys Fees

Plaintiff did not provide evidence sufficient to enable the court to calculate prejudgment interest on any basis other than the federal judgment rate. Plaintiff also failed to establish any basis upon which the court can award attorneys fees.

## 1 | CONCLUSION

2 On the basis of the evidence introduced at trial, I find that  
3 from June 25 to August 14, 2007, Pitz made charges on her American  
4 Express Cards totaling \$120,324 without intending to repay those  
5 charges. I find that American Express was justified in relying on  
6 Pitz's implied representation of intent to repay with respect to the  
7 charges made through August 14, 2007. I find that after August 14,  
8 2007, American Express could not justifiably rely on Pitz's implied  
9 representation of intent to repay. I therefore determine that  
10 Debtor's obligation to Plaintiff is non-dischargeable in the amount  
11 of \$120,324, plus prejudgment interest from August 14, 2007 at the  
12 federal judgment rate.

**\*\*END OF MEMORANDUM DECISION\*\***

## Court Service List

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